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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JAMES CARTER III et al., Plaintiffs and Respondents, v. DISCOUNT COURIER SERVICES, INC. et al., Defendants and Appellants.	D073105 (Super. Ct. No. 37-2017-00017288-CU-WT-CTL)

APPEAL from an order of the Superior Court of San Diego County, Timothy B. Taylor, Judge. Affirmed.

The Schlueter Firm and John R. Marshall for Defendants and Appellants.

Klinedinst, Thomas E. Daugherty and G. Dale Britton for Plaintiffs and Respondents.

In this lawsuit, plaintiffs James Carter III and Carlos Hernandez allege a variety of wage and hour claims arising from their general assertion that defendants Discount Courier Services, Inc., Belville Enterprises, Inc., Matthew Lowe, and Ronald Belville

(collectively, Discount Courier), misclassified them as independent contractors rather than employees. The operative complaint alleges, inter alia, a variety of Labor Code violations and seeks civil penalties under the Private Attorneys General Act of 2004 (PAGA) (Lab. Code, § 2698 et seq.).

In this appeal, Discount Courier challenges the trial court's order denying its motion to compel arbitration of the claims. It asserts the trial court erred in finding the arbitration agreement to be unconscionable and that it did not apply to the claims raised by plaintiffs. We find no error by the trial court and accordingly affirm.

FACTUAL AND PROCEDURAL BACKGROUND

As alleged in the operative complaint, plaintiffs Carter and Hernandez worked as delivery drivers for defendants. They signed an independent contractor agreement with Discount Courier and were tasked with making deliveries to different facilities and customers from a pharmacy operated by defendant Belville. They allege that despite being labeled as independent contractors, Discount Courier and Belville exercised strict control over the performance of their deliveries. Their complaint generally arises from their contention that they were misclassified as independent contractors when Discount Courier and Belville were, as a matter of law, their joint employers. They allege causes of action for wage and hour claims premised on several Labor Code provisions that apply to employees. They also allege causes of action for unfair business practices pursuant to Business and Professions Code section 17200, fraudulent concealment, retaliation, wrongful termination, and seek civil penalties pursuant to the PAGA (Lab. Code, § 2698 et seq.)

As part of the agreement between the drivers and Discount Courier, the parties agreed to arbitrate "all matters in dispute arising out of this agreement." The agreement states that all disputes "must be submitted . . . to the JAMS (Judicial Arbitration and Mediation Service) . . . under the rules as may exist at that time."

Seeking to enforce the agreement, Discount Courier filed a motion to compel arbitration and dismiss or stay the pending lawsuit. In opposition, plaintiffs requested judicial notice of the applicable JAMS rules, which they contend required the parties to split all costs and fees associated with the arbitration. They also submitted declarations stating that Discount Courier presented the agreement as "take-it-or-leave it" with no ability to negotiate the terms. In reply, Discount Courier submitted a declaration from its president disputing the plaintiffs' characterization of the agreement as a "take-it-or-leave-it agreement."

The trial court granted the request for judicial notice of the applicable JAMS rules, noting that Discount Courier did not oppose the request. The trial court also disregarded the evidence submitted by Discount Courier in support of its reply brief, finding that it should have been submitted in support of the motion.

Following a hearing, the court denied the motion to compel arbitration on multiple grounds. It narrowly construed the arbitration provision to not apply to the statutory claims raised by plaintiffs. It also found the representative PAGA claim to not be subject to arbitration.

The court further concluded that the arbitration provision was unenforceable due to its unconscionability. It found the provision to be procedurally unconscionable based

on the evidence that Discount Courier presented it to the plaintiffs on a "take-it-or-leave it basis" without the ability to negotiate the terms and due to the inclusion of ambiguous terms regarding the applicable law. The court also found the provision to be substantively unconscionable due to the requirement that the parties split all costs and fees and that it improperly included the PAGA claims. Thus, the court concluded the agreement "is permeated with substantive unconscionability and cannot be enforced." Finally, the court found that the agreement only applied to the signatories—the two plaintiffs and Discount Courier—and could not be enforced by the other defendants. The court reasoned this lack on uniform enforceability resulted in the possibility of inconsistent rulings, weighing in favor of requiring all claims to be resolved in court. Discount Courier appeals the denial order.

DISCUSSION

A party who claims there is an applicable written arbitration agreement may petition the superior court for an order compelling the parties to arbitrate. (Code Civ. Proc., § 1281.2.) Such a petition essentially seeks specific performance of the arbitration agreement. (*Rice v. Downs* (2016) 248 Cal.App.4th 175, 185.) The proponent of arbitration must prove, by a preponderance of the evidence, the existence of an agreement to arbitrate while the opponent of arbitration must prove, to the same standard, any defense to enforcement of the arbitration agreement. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development* (*US*), *LLC* (2012) 55 Cal.4th 223, 236 (*Pinnacle*).) When the facts are undisputed, we review the trial court's denial of arbitration de novo. (*Ibid.*)

Here, the trial court found that even if an agreement to arbitrate exists that applies to all the parties and the underlying lawsuit is within the scope of that agreement, the arbitration provision is unenforceable because it is unconscionable.

"If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." (Civ. Code, § 1670.5, subd. (a).) Given that arbitration is a matter of contract, courts must place arbitration agreements on an equal footing with other contacts and should decline to enforce any arbitration agreement that is unconscionable. (*AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 339-340.)

"Unconscionability consists of both procedural and substantive elements. The procedural element addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power. [Citations.] Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided. [Citations.] A contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be 'so one-sided as to "shock the conscience." ' " (*Pinnacle*, *supra*, 55 Cal.4th at p. 246.)

Here, the only admitted evidence in the record supports the trial court's finding that the arbitration agreement is contained in a contract of adhesion presented to Carter and Hernandez as a "take-it-or-leave-it agreement." As such, the agreement is, by

definition, procedurally unconscionable to at least some degree. (See *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094, 1100; see also *Higgins v. Superior Court* (2006) 140 Cal.App.4th 1238, 1252-1253 [high degree of procedural unconscionability where arbitration clause was in a paragraph near the end of a lengthy single-spaced document drafted by sophisticated defendants and signed by young and unsophisticated plaintiffs who had no opportunity to negotiate].)

Discount Courier attempted to introduce evidence supporting its assertion that the agreement was not adhesive, but the trial court excluded that evidence on the basis that it was submitted for the first time in support of the reply brief. Discount Courier fails to establish any abuse of discretion in excluding this evidence. "The general rule of motion practice, which applies here, is that new evidence is not permitted with reply papers." (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537.) Although new evidence may be allowed in exceptional circumstances and the trial court *may* exercise its discretion to consider new evidence with the reply, Discount Courier makes no attempt to demonstrate any exceptional circumstance is present here.

Next, Discount Courier contends that even if the agreement was adhesive, this is not enough to establish procedural unconscionability. As framed by Discount Courier in its opening brief: "The question is what is wrong with a take-it-or-leave-it contract? The answer is nothing as held by the California Supreme Court in a unanimous decision."

The Supreme Court decision cited by Discount Courier, however, does not help its cause. In that decision, *Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237 (*Baltazar*), the Supreme Court acknowledged that an ordinary contract of adhesion is not subjected

to the same level of scrutiny as contracts of adhesion that " 'involve surprise or other sharp practices. ' " (*Id.* at p. 1245.) Finding no element of substantive unconscionability, the court held that the agreement was not unenforceable despite finding that the arbitration agreement was adhesive. (*Id.* at pp. 1246-1251.) In that sense, Discount Courier correctly identifies an established principle of law that an agreement that is procedurally unconscionable because it is adhesive may nevertheless be enforceable when it is not substantively unconscionable. In other words, " ' "[t]he prevailing view is that [procedural and substantive unconscionability] must *both* be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability." ' " (*Id.* at p. 1243.) This principle, however, is undisputed in this case. Neither the trial court nor plaintiffs argue the agreement here is unenforceable simply because Carter and Hernandez were required to accept the agreement with no ability to negotiate. Instead, as discussed below, they argue the contract is unenforceable because it is adhesive *and* substantively unconscionable.

Moreover, the agreement involved in *Baltazar* is distinguishable from the agreement at issue in this dispute in one critical manner as it relates to procedural unconscionability. In *Baltazar*, the court considered but rejected the argument that the procedural unconscionability of the agreement was heightened by the application of arbitration rules referenced in the agreement but not attached to the agreement or otherwise provided to the plaintiff. (*Baltazar*, *supra*, 62 Cal.4th at p. 1246.) The court recognized case law holding that a failure to provide a copy of the arbitration rules to which the employee would be bound supports a finding of procedural unconscionability,

but only when the claim of substantive unconscionability arises in some manner on the arbitration rules in question. (*Ibid.*) Finding no such claim, the court held that the failure to provide a copy of the applicable rules had no bearing on the procedural unconscionability of the agreement. (*Ibid.*)

Here, however, plaintiffs were not provided with the applicable arbitration rules *and* those rules are the source of their claim of substantive unconscionability, as discussed below. The agreement states that any arbitration will proceed "under [the JAMS] rules as may exist at that time." Given that it would be impossible for the parties to foresee when this dispute would arise at the time they signed the agreement, it was likewise impossible to know which set of rules would apply to the dispute. Thus, unlike the situation presented in *Baltazar*, the agreement here was both adhesive and hindered by an element of surprise. As recognized by the *Baltazar* court, "courts will more closely scrutinize the substantive unconscionability of terms that were 'artfully hidden' by the simple expedient of incorporating them by reference rather than including them in or attaching them to the arbitration agreement." (*Baltazar, supra,* 62 Cal.4th at p. 1246.)

Turning to substantive unconscionability, the trial court found that the applicable arbitration rules required the parties to share all fees and expenses associated with the

arbitration.[1] Not only were the plaintiffs required to pay their share of the fees and expenses, the agreement warned that plaintiffs may be barred from offering any evidence if they did not pay them as they were incurred during the proceedings. Such a provision is impermissible in an arbitration agreement contained in a contract of employment. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 110-111; *Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 918 ["In the context of mandatory employment arbitration of unwaivable statutory rights, we have held that arbitration agreements 'cannot generally require the employee to bear any *type* of expense that the employee would not be required to bear if he or she were free to bring the action in court.' "].) Moreover, the inclusion of this substantively unconscionable provision in the arbitration rules that were not, and could not have been, provided to plaintiffs bolsters the claim of procedural unconscionability. Discount Courier offers no persuasive argument to the contrary.

The trial court found "the arbitration provision is permeated with substantive unconscionability and cannot be enforced." If a trial court finds the agreement to arbitrate is unconscionable, it still has discretion to sever the unconscionable aspects of

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1 Discount Courier contends that the trial court relied on the wrong set of arbitration rules and that the proper rules that apply to this dispute do not require the parties to split the fees. This contention, however, is not supported by any evidence in the record. Plaintiffs submitted the arbitration rules in a request for judicial notice, which the trial court granted after Discount Courier failed to oppose the request. Discount Courier did not present these alleged alternative rules to the trial court, precluding its ability to rely on these rules on appeal. (See, e.g., *Knapp v. City of Newport Beach* (1960) 186 Cal.App.2d 669, 679 ["Statements of alleged fact in the briefs on appeal which are not contained in the record and were never called to the attention of the trial court will be disregarded by this court on appeal."].)

an arbitration agreement if the interests of justice are furthered by severance and the agreement is not permeated by unconscionability. (*Magno v. The College Network, Inc.* (2016) 1 Cal.App.5th 277, 291-292.) We review the trial court's decision on severability for abuse of discretion. (*Id.* at p. 292.)

Here, the trial court declined to exercise its discretion to sever the unconscionable arbitration rules. Discount Courier does not raise the issue of severability in its opening brief and declined to file a reply brief. We find the issue forfeited. (*Samaniego v. Empire Today*, LLC (2012) 205 Cal.App.4th 1138, 1149; *Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 452 [points not raised in the opening brief will not be considered].)

In addition to finding the agreement to be unconscionable, the trial court also concluded the current dispute is outside the scope of the arbitration agreement and does not apply to all defendants. Because we hold that the trial court did not err in finding the agreement to be unconscionable, and therefore unenforceable, we need not address the scope of the agreement or the alternative reasons why it is not enforceable.

DISPOSITION

The order is affirmed. Respondents are entitled to their costs on appeal.

BENKE, Acting P. J.

WE CONCUR:

NARES, J.

DATO, J.